PACIFIC & ORIENT INSURANCE CO. SDN. BHD. v. LIM SEW CHONG & ANOR.

[O.C.J. (Abdul Hamid F.J.) May 31, 1982]

[Seremban – Civil Suit No. 22 of 1981]

Insurance law – Insurance policy issued in name of deceased – Proposal form signed by son of deceased – "Ng Hwee Bin – deceased" inserted in proposal form – Non-disclosure – Misrepresentation – Whether policy avoidable – Insurable interest of executor de son tort – Contracts Act, 1950, ss. 10(1) & 11.

Insurance law – Motor insurance – Executor de son tort has insurable interest.

The plaintiffs, an insurance company, claimed against the defendants, the administrators of the Estate of Ng Hwee Bin, deceased, a declaration for the avoidance of an insurance policy on the ground that the policy was void *ab initio* by reason of the incapacity of the deceased or alternatively that the contract of insurance was void *ab initio* on the ground of mutual mistake. The policy was issued at the request of Ng Moh Chee, son of the deceased. In the proposal form and declaration headed "Proposer's Name" was inserted "Ng Hwee Bin – deceased". The form was signed by Ng Moh Chee, who paid the premium for the insurance policy issued in the name of Ng Hwee Bin, deceased, in respect of motor-lorry ND 6734, which was involved in an accident with motor-vehicle CB 1001. The plaintiffs subsequently received a claim signed by Ng Moh Chee, who on each occasion he renewed the policy disclosed to the agents of the plaintiffs that his father had died and that he was managing the deceased's estate.

Held: (1) an executor *de son tort* has an insurable interest and Ng Moh Chee acting in the capacity of executor *de son tort* was competent to take out an insurance policy in respect of the motor-lorry which was the estate property;

(2) there was evidently no question of any non-disclosure or misrepresentation in the proposal form relating to material fact;

(3) accordingly, the plaintiffs were not entitled to a declaration that they be entitled to avoid the policy.

Cases referred to:

(1) *Dunn* v. *Ocean Accident and Guarantee Corporation Ltd.* (1933) 45 Ll. L. Rep. 276 K.B.
(2) *Pacific & Orient Underwriters (M) Sdn. Bhd.* v. *Choo Lye Hock* [1977] 1 M.L.J. 131.
(3) *Poh Sin Mining Co.* v. *Welfare Insurance Co. Ltd.* [1971] 1 M.L.J. 65.
(4) *Tan Kang Hua* v. *Safety Insurance Co.* [1973] 1 M.L.J. 6.

CIVIL SUIT.

S. Kanagasabapathi for the plaintiffs.

Francis Lim Chiew Kwee for the defendants.

Cur. Adv. Vult.

Abdul Hamid F.J.: Pacific & Orient Insurance Co. Sdn. Bhd. are the plaintiffs and Lim Sew Chong and Ng Moh Siew @ Wong Moh Siew are the defendants, the administrators of the Estate of Ng Hwee Bin @ Wong Wai Mion, deceased.

The plaintiffs' claim is for

(a) a declaration that they are and have at all material times been entitled to avoid the Policy of Insurance No. 645 CV 117 apart from any provision contained therein on the grounds that the said Policy was void *ab initio* by reason of the incapacity of a party, *i.e.* the deceased.

(b) In the alternative that the contract of insurance was void *ab initio* on the grounds of mutual mistake.

The facts substantially not in dispute are that in January 1975 one Ng Moh Chee son of deceased requested the plaintiffs to issue a policy of insurance third party risks in respect of motor-lorry No. ND 6734.

In the proposal form and declaration headed "Proposer's Name" was inserted "Ng Hwee Bin – deceased" – the form signed by Ng Moh Chee.

Messrs. Minsoon Credit Corp. (Pte.) Ltd., Seremban as agents of the plaintiffs received the proposal form and declaration from Ng Moh Chee and forwarded the same to the plaintiffs and the plaintiffs received it on February 4, 1975.

Minsoon Credit issued a cover note on January 21, 1975 in the name of Ng Hwee Bin (deceased).

The plaintiffs issued, in consideration of a sum of $1231.70 paid by Ng Moh Chee as premium, a policy of insurance No. 645 CV 117 in the name of Ng Hwee Bin, deceased.

On April 9, 1975, motor-lorry ND 6734 was involved in an accident with motor-vehicle CB 1001. The plaintiffs were informed by Messrs. Commercial Union Ass. Co. Ltd.

Subsequently the plaintiffs received a claim signed by Ng Moh Chee. The plaintiffs have alleged that they then became aware that they issued the policy of insurance to a deceased person.

It is not in dispute that the policy of insurance was applied for and issued in the name of the

deceased for 1973 and 1974 in respect of the same vehicle.

Ng Moh Chee on each occasion he renewed the policy disclosed to one Mr. Gan the person in charge of Minsoon Credit that his father had died and that he was managing his father's estate. The forms were then filled by Gan who thereupon issued the cover note.

It is revealed that two other policies for 1976 and 1977 were similarly issued.

It may perhaps be relevant to mention that Letters of Administration were granted in November 1973 to Madam Lim Sew Chong and Ng Moh Chee @ Ng Chee Yong but were not extracted.

Plaintiffs' submission:

It is submitted that –

(a) Ng Hwee Bin, deceased, did not have the capacity to contract and therefore the policy of insurance was void *ab initio*.

The contention is that by reason of section 10(1) and section 11 of the Contracts Act 1950 both of which are set out below,

"10.(1) All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."

"11. Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject "

Ng Hwee Bin had no capacity to contract. It was void *ab initio* and therefore null and void and of no effect. The fact that policies were issued for 1973 to 1977 did not make the deceased competent to enter into a contract.

(b) Ng Moh Chee, the son of the deceased, at the time of entering into the contract, had no capacity to sign on behalf of the deceased.

It is the plaintiffs' contention that the vehicle was not at any time registered in Ng Moh Chee's name. The capacity of Ng Moh Chee was not stated or known. He was not and could not have acted as administrator of the estate.

Reliance is placed on *Dunn* v. *Ocean Accident and Guarantee Corporation Ltd.*[1] where a proposer signed the proposal form in her maiden name whereas for four years she had been secretly married to one Mr. Hunt and Avory J. held "that there had been a breach of warranty and that the Insurance Co. was entitled to avoid liability in the policy."

It is argued by the plaintiffs that the proper citation of the insured party is very vital.

In answer to the defendants' contention that Ng Moh Chee contracted in the capacity of "executor *de son tort*", it is argued that Ng Moh Chee could not have signed as executor *de son tort* unless it is stated on the proposal form. It is further argued that since he acted without the capacity to do so he is liable to actions by aggrieved persons.

In answer to the defendants' contention that in issuing the policy to the deceased by the plaintiffs there was clearly a mere inaccurate description of the parties to the contract, it is submitted that this was not so since this was a case where one party is existent and the other non-existent.

Defendants' submission:

On the other hand, it is the defendants' contention that Ng Moh Chee (a) was an executor *de son tort*, and, (b) was the insured at the material time. It is argued that since Ng Moh Chee was an executor *de son tort* he therefore had an insurable interest. There was no mistake as to the identity of the insured but a mere inaccurate description of the insured brought about by the plaintiffs themselves.

The legal question for this Court to determine is whether Ng Moh Chee had the capacity to contract for a policy of insurance. It is common ground that Ng Moh Chee was granted Letters of Administration in 1973 but they were not extracted. Nevertheless it is a fact that at all material times he managed the estate of his father the deceased assuming thereby the character of an executor *de son tort*.

Halsbury's Laws of England Vol. 16 3rd Ed. p120 para 172 defines an executor *de son tort* to mean "one who takes upon himself the office of an executor, or intermeddles with the goods of a deceased person, without having been appointed an executor by the testator's last valid will or codicil thereof, or without having obtained a grant of administration from a competent Court....."

On the facts not in dispute it would seem to me that when Ng Moh Chee took it upon himself to secure an insurance policy in respect of the motor-vehicle the property of his deceased father he was in fact acting in the character of an executor *de son tort* and in that character had the capacity to do what is beneficial to the estate. If I may I would briefly refer to the plaintiffs' submission that by virtue of sections 10(1) and 11 of the Contracts Act, 1950 (Act 136) Ng Hwee Bin, the deceased, had no capacity to contract. With all respect, I do not think there has been a suggestion that the deceased had the capacity to contract. The defendants' case is that Ng Moh Chee was the one who had the capacity to do so and Ng Moh Chee was the insured and that the plaintiffs were fully aware that he was. The plaintiffs have also contended that Ng Moh Chee had no capacity to sign on behalf of the deceased as the vehicle was not in his name. It is a fact known to all concerned that the vehicle was not in the name of Ng Moh Chee and it was never represented that he was signing on behalf of the deceased. Ng Moh Chee was a son managing the estate of his father and in that capacity he assumed the character of executor *de son tort*. The materials before the Court clearly show that Mr. Gan of Minsoon Credit Corp. (Pte.) Ltd. had full knowledge that Ng Moh Chee was managing the estate of his late father and was insuring his late father's vehicle.

It is true that Ng Moh Chee did not state in the proposal form that he was an executor. The reason is obvious. He did not know that in law he had assumed such character. At any rate I do not think he could be expected to know. As far as he was concerned he assumed the responsibility of managing the estate and for the benefit of the estate he had to take it upon himself to insure the motor-vehicle, the estate property.

The next question for determination is whether in the capacity of an executor *de son tort* Ng Moh Chee had an insurable interest. The following passage from *MacGillivray*, Insurance Law 5th Ed. Vol. 1 at p. 445/6 (7th Ed. p. 119) shows that he has –

"INSURABLE INTEREST IN PROPERTY Definition of. Insurable interest in property is not confined to the absolute legal ownership. Generally, any person who is so situated that he will suffer loss as the proximate result of damage to or destruction of the property has an insurable interest in it. But there must be some direct relationship to the property itself, for otherwise the interest is too remote and therefore not insurable. In *Lucena* v. *Craufurd* Lord Eldon said, 'I am unable to point out what is an interest unless it be a right in the property or a right derivable out of some contract about the property,' and if we add to this, 'or some legal liability to make good the loss,' we get a substantially accurate definition of insurable interest in property. Some modern American cases support the rather wider proposition that a person has an insurable interest in property by the existence of which he receives a benefit, or by the destruction of which he would suffer loss, regardless of title, legal or equitable."

My view is that there seems to be clear law to show that an executor *de son tort* has an insurable interest and Ng Moh Chee acting in the capacity of executor *de son tort* was competent to take out an insurable policy in respect of the motor-vehicle which was the estate property.

The plaintiffs however argued that Ng Moh Chee gave inaccurate answers in the proposal form – first in respect of the proposer's name where it is stated as "Ng Hwee Bin – deceased." And also in answer to a question on the proposal form –

"Are you the owner of the vehicle and is it registered in your name? If not give full details.

The answer given is 'Yes'."

The defendants are contending that the reference to "Ng Hwee Bin (Deceased)" as the proposer was a mere inaccurate description of the insured and in fact there was no mistake as to the identity of the insured. The defendants have also contended that Minsoon Credit Corporation as agents of the plaintiffs, knew of the death of Ng Hwee Bin and the knowledge of an agent was knowledge of the principal. This is revealed from the policy of insurance that was issued which described the insured as "Ng Hwee Bin – deceased."

This is essentially a question of fact. In order to arrive at a proper decision it is necessary to stress that to renew the policy Ng Moh Chee called at Minsoon Credit Corp. and was attended to by Mr. Gan who incidentally renewed the policy twice before (1973, 1974). He told Mr. Gan that he wanted to renew the policy and disclosed the fact that he was managing the estate of his father the deceased. The form was filled by Mr. Gan. I had the occasion to state in *Pacific & Orient Underwriters (M) Sdn. Bhd.* v. *Choo Lye Hock*[2] that the declaration at the bottom of the proposal form before the signature of the proposer (there exists a similar declaration in the present case) only raises a rebuttable presumption – rebuttable by any extraneous evidence. And I proceeded to hold that in that case the agent who filled the form was not the agent of the respondent but that of the Insurance Underwriters – the applicants.

The facts of the present case are somewhat similar to the facts of that case in that the inaccurate description given in regard to the proposer's name was effected by Mr. Gan and so was the answer to the question and thereupon Mr. Gan himself issued the cover note with the insured described as "Ng Hwee Bin (Deceased)", and subsequently so described in the insurance policy. As far as Gan was concerned there was no mistake as to the identity of the insured.

Chang Min Tat J. (as he then was) in *Poh Sin Mining Co.* v. *Welfare Insurance Co. Ltd.*[3] said that –

"If there was a latent ambiguity in the policy extrinsic evidence was admissible to identify the persons and things referred to in the policy....."

In the present case my view is that the facts clearly show that both Minsoon Credit Corp. and the plaintiffs had full knowledge that Ng Hwee Bin had died and Ng Moh Chee who at all material times was managing the estate of the deceased took out the policy in respect of the motor-lorry belonging to the estate.

There was evidently no question of any non-disclosure or misrepresentation in the proposal form relating to a material fact.

Even assuming there was a non-disclosure and misrepresentation it was held by the Federal Court in *Tan Kang Hua* v. *Safety Insurance Co.*[4] that if "the insurers were aware of the facts which were alleged to have been concealed by the defendants at the time of the issue of the policy, they were not entitled to the declaration they asked for" – *i.e.* a declaration to avoid the contract.

For reasons I have stated, it is my considered judgment that the plaintiffs are not entitled to a declaration that they be entitled to avoid the policy.

The plaintiffs' claim is accordingly dismissed with costs.

Claim dismissed.

Solicitors: *R.K. Nathan & Co.; Lee Boon Peng & Co.*

PUBLIC PROSECUTOR v. RAYMOND CHIA KIM CHWEE & ANOR.

[A. Cr. J. (Mohamed Azmi J.) September 13 & 15, 1982]

[Kuala Lumpur – Criminal Appeals Nos. 87 and 88 of 1982]

Criminal Law and Procedure – Charge of forgery of particular documents – Applications for documents in the possession of prosecution to be supplied to accused – Application allowed in respect of documents specifically referred to in charge and documents removed by prosecution from possession of accused – Appeal – Whether appeal lies – No summons for production issued – Appeal allowed – Particulars of charge to be supplied to accused – Criminal Procedure Code (F.M.S. Cap. 6), ss. 15, 152, 153, 154, 173 & 307(i) – Penal Code, ss. 34, 467 & 471.

In this case the two respondents were charged with three others for the offence of forgery under sections 467 and 471 of the Penal Code read with section 34 of the Code. In the charge they were alleged to have used dishonestly a letter of credit for the amount of $2.4 million with certain named documents. The two respondents applied for various documents in the possession of the prosecution including the five documents mentioned in the charge for their inspection. The learned President of the Sessions Court made an order in favour of the respondents confined to the inspection of (1) documents specifically referred to in the charge and (2) documents removed by the prosecution from the possession of the respondents. The Public Prosecutor appealed.

Held: (1) the order made by the learned President was not a procedural order but a final order purportedly made under section 51 of the Criminal Procedure Code and it was therefore appealable under section 307(i) of the Criminal Procedure Code;

(2) the proper procedure would be for the requesting party to make an application for a summons to be issued by the court against a particular person and to specify the documents or property required to be produced by such person. In this case no summons had been issued and on the facts no summons could have been issued as the application was too general in the case of Raymond Chia and too all-embracing in the case of Zainal. In the circumstances the learned President cannot be said to have exercised his discretion judicially in granting the order even if summons had been served on the Public Prosecutor in the first instance;

(3) in cases of forgery where various documents had been specifically referred to in the charge in respect of which the forgery was alleged to be perpetrated, the charge must give such particulars as are necessary to enable the accused to prepare his defence or give proper instructions to his counsel before trial;

(4) in this case copies of the five documents referred to in the charge ought to be annexed to the charge. In the circumstances the prosecution could not be prejudiced by supplying photostat copies of these documents to the respondents.

Cases referred to:

(1) *Anthony Gomez* v. *Ketua Polis Daerah, Kuantan* [1977] 2 M.L.J. 24.